

**THE PROBATE AND ESTATE PLANNING SECTION  
Respectfully submits the following position related to**

**THE PROPOSED MICHIGAN TRUST CODE  
AND CONFORMING CHANGES AND AMENDMENTS  
TO RELATED STATUTES**

The Probate and Estate Planning Section is not the State Bar of Michigan itself, but rather a Section that members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate and Estate Planning Section only and is not the position of the State Bar of Michigan. To date, the State Bar does not have a position on this matter.

The total membership of the Probate and Estate Planning Section is approximately 5,000.

The Council of the Probate and Estate Planning Section supports the enactment of legislation to establish the Michigan Trust Code, to amend and make conforming changes to 1998 PA 386 entitled "Estates and Protected Individuals Code," MCL 700.1101 *et seq.*, to amend section 13 of 1967 PA 224 entitled "Powers of Appointment Act of 1967," MCL 556.123, to amend section 1 of 1998 PA 434 entitled "Michigan Uniform Fraudulent Transfer Act," MCL 566.3, to amend section of 1846 RS 81 entitled "Of fraudulent conveyances and contracts, relative to goods, chattels, and things in action," MCL 566.131, and to amend 1846 RS 63 entitled "Of uses and trusts," MCL 555.1 to 55.27.

This position was adopted by the Council of the Probate and Estate Planning Section by vote of the Council on June 21, 2008. The number who voted in favor of supporting the proposed Michigan Trust Code and recommending it to the legislature for adoption was 13. The number who voted opposed to this position was 4.

# **SUMMARY OF THE MICHIGAN TRUST CODE**

**PREPARED FOR MEMBERS  
OF THE  
MICHIGAN LEGISLATURE**

**BY**

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**FEBRUARY 2009**

The law of trusts in Michigan relies on a mix of statutes and case law and is an incomplete body of law with numerous gaps and unanswered questions. The Michigan Trust Code (the “**Code**” or the “**MTC**”) represents the culmination of a five year drafting process led by the Michigan Trust Code Committee of the Probate and Estate Planning Section of the State Bar of Michigan in consultation with the Michigan Bankers Association Trust Counsel Committee and the Michigan Probate Judges Association. If enacted into law, the proposed Michigan Trust Code will provide the citizens of Michigan with a comprehensive codification of the law of trusts.

## **Background**

In 2000 the National Conference of Commissioners on Uniform State Laws approved the Uniform Trust Code (“**UTC**”) and recommended it to the states for enactment. The UTC has gained significant acceptance among the states. To date, twenty states and the District of Columbia have enacted the UTC or a variation of it. In addition, enacting legislation is currently pending in Connecticut, Massachusetts, and Oklahoma. Among the more noteworthy enacting states are Ohio, Florida, Arizona, Pennsylvania, and Virginia.

Beginning in late 2003, the Michigan Trust Code Committee (the “**Committee**”) used the UTC as its starting point for the drafting and for the structure of the Michigan Trust Code. Nevertheless, the Michigan Trust Code will be a uniquely Michigan document that draws from both the UTC and existing Michigan law to preserve long established procedures, practices, and principles of Michigan trust law while also filling the numerous gaps that exist in the law today.

## **Benefits of Enacting the Michigan Trust Code**

The Michigan Trust Code will provide numerous benefits to Michigan’s citizens.

### *Certainty*

Trusts are in widespread use in Michigan for the management and transfer of wealth during lifetime and at death and to minimize federal estate and gift taxes. However, the law of trusts in Michigan is based upon an incomplete set of statutory provisions found in the Estates and Protected Individuals Code, MCL 700.7101 *et seq.* (“**EPIC**”), the antiquated Statute of Uses and Trusts, MCL 555.1 *et seq.*, and case law. Numerous questions are unanswered. The Michigan Trust Code answers many of the questions regarding the formation, administration, modification, and termination of trusts and will provide certainty to citizens to aid them in their planning and to the courts in resolving questions and disputes. The Committee drafted the Michigan Trust Code to become part of the enacting legislation for EPIC, and together EPIC and the MTC will provide a single source for answers to questions involving estates and trusts and the settlement of decedent’s estates.

### *Modernize the Law of Trusts*

The UTC modernizes the law of trusts in several important respects by providing rules of trust law that cannot be overridden by the terms of the trust, defining when representation of trust beneficiaries can occur, providing a comprehensive set of rules for trust modification and termination, dealing specifically with revocable trusts used as Will substitutes, and defining the nature and status of trust protectors.

### *Uniformity of Laws*

The Michigan Trust Code’s reliance upon the Uniform Trust Code for many of its provisions and the widespread adoption of the UTC means that Michigan’s courts can more easily look to the laws of other states for guidance in resolving cases.

### *Creating a Level Economic Playing Field for Michigan Banks*

Michigan residents are free to appoint persons and institutions in other states as trustees of their trusts and to subject the trusts to the laws of the states where the trustees are located. When they do so, however, they remove the administration and the management of these trusts to these other jurisdictions. Ohio, Florida, and Arizona all have enacted a version of the UTC. Because of the influence of Ohio banks in Michigan it will be very easy for a Michigan resident to appoint the Ohio affiliate of his local bank as trustee. Similarly, Michigan residents who spend portions of their year in Florida and Arizona can also appoint Florida and Arizona banks as trustee.

By enacting the Michigan Trust Code, Michigan can neutralize the attraction of Ohio, Florida, and Arizona as alternative places to domicile trusts because of the availability of their law to govern trusts, and thereby retain in Michigan the management and administration of these trusts, and the jobs this work brings.

## **Comparison to Current Michigan Law**

The Committee preserved well established Michigan law unless a compelling public policy consideration made it appropriate to change the law. For example:

- Thirty-two provisions of the Code have been identified as essentially consistent with either existing Michigan common law or current statutes.
- Forty-eight sections of the Code involve sections of the UTC that have been modified or are sections that have been added, in either case so the Michigan Trust Code more closely follows existing Michigan common law or current statutes than what the UTC does.
- Approximately 34 provisions represent “gap fillers” providing law in areas where no Michigan law now exists. The Committee believes these provisions are consistent with the law or practice in Michigan today or will be readily accepted.
- Only three provisions represent significant departures from current law.

### *Changes to the UTC to Preserve Michigan Law*

Some of the more noteworthy provisions of the UTC that have been modified or provisions that have been included in the MTC to preserve current Michigan law are:

- The MTC provisions for giving notice of the existence of trusts and accountings to beneficiaries depart significantly from the UTC and instead follow EPIC.
- The MTC preserves Michigan’s system of voluntary trust registration, which is not a part of the UTC.
- Article 5 of the UTC deals with the rights of creditors of trust beneficiaries and was controversial. However, the Michigan Trust Code Committee reviewed current Michigan case law and found that is comprehensive and closely follows the Restatement (Second) of the Law of Trusts. The Committee rejected the UTC provisions and drafted a set of provisions that codifies the current case law.
- No UTC counterparts exist for the provisions of EPIC pursuant to which creditors of a decedent may bring claims against the decedent’s revocable living trust when no probate proceeding exists or the probate estate is inadequate. These provisions have been preserved.
- The trustee powers are taken directly from EPIC.
- EPIC provisions dealing with environmental matters, tax matters, and payment provisions have each been added to the Code.

- Michigan law with respect to recovery of attorneys fees by trustees and beneficiaries has been preserved and codified.

### *Changes to Michigan Law*

The significant changes to Michigan law are found in the following areas:

- The persons who create charitable trusts will have standing to enforce the terms of the trusts.
- The standard of capacity to create revocable trusts will be that required to make a Will. In addition, the standard of capacity to make a Will has been raised so it is consistent with the standard used for other common estate planning documents.
- Trusts established after the effective date of the Code will be presumed to be revocable unless they state they are irrevocable.

### *Gap Fillers*

An important function of the Michigan Trust Code is to eliminate gaps in the law. Important “gap fillers” in the draft of the Code include:

- In Part 1 the rules related to ademption, exoneration, and penalty or “no contest” provisions that are applicable to Wills have been applied to trusts, eliminating areas of incompleteness or uncertainty regarding the interpretation of trusts.
- In Part 3 the representation provisions found in EPIC sections 1209 and 1403 that currently apply to trusts in judicial proceedings have been extended to nonjudicial settings.
- Section 7414 provides a basis on which to terminate small or uneconomic trusts.
- Section 7604 provides a statute of limitations for challenges to the validity of trusts.
- Part 7 has provisions that fill numerous gaps in current law related to accepting or declining trusteeships, filling vacancies, resignation, and removal of trustees.
- Section 7802 provides comprehensive rules related to the duty of loyalty of trustees.
- Section 7809 provides rules to govern trust protectors.
- Section 7913 authorizes and validates the use of certificates of trust beyond the area of real estate transactions.

## Structure

The MTC consists of 109 sections, organized in ten parts.<sup>1</sup> The Committee drafted the MTC to replace the existing provisions dealing with trust that are currently found in Article VII of EPIC.

### *Part 1*

This Part consists of one definitional section and a number of sections of general applicability. Key topics covered in this Part are the scope of the Code; the governing law of trusts; a provision that makes the MTC a series of default rules, subject to fifteen specific areas where the persons who establish trusts are not free to vary the default rule; methods and waiver of notice; nonjudicial settlement agreements; and the extension of several rules of construction for Wills to revocable trusts.

### *Part 2*

Part 2 contains a series of provisions dealing with the jurisdiction of the courts, venue, and continues the current system of voluntary trust registration.

### *Part 3*

Part 3 deals with representation of beneficiaries in matters such as the receipt of notice and consent. These sections closely follow the representation provisions found in Sections 1209 and 1403 of EPIC. However, current EPIC Sections 1209 and 1403 only apply in the context of judicial proceedings. Part 3 will be applicable at all times, not just when a judicial proceeding is ongoing.

### *Part 4*

Part 4 consists of seventeen sections pertaining to the creation, modification and termination of trusts, including charitable trusts. Sections 7401 through 7409 deal with the creation, validity, and purposes of trusts. Sections 7410 through 7417 focus upon issues related to modification and termination of trusts.

### *Part 5*

Part 5 deals with the relationships to trusts of creditors of beneficiaries<sup>2</sup> of trusts, the enforceability of spendthrift provisions, and the effect of discretionary distribution powers.

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<sup>1</sup> The Uniform Trust Code is organized in eleven Articles. It contemplates that enacting states will enact the Uniform Prudent Investor Act as Article Nine of the Code if they have not already done so. For states such as Michigan that have already enacted the Uniform Prudent Investor Act, this Article can be omitted.

<sup>2</sup> The focus upon creditors of *beneficiaries* is important. The MTC does not authorize self-settled asset protection trusts.

## *Part 6*

Part 6 deals with revocable trusts, which are regularly used in Michigan as substitutes for Wills. The Michigan Trust Code supplements the UTC provisions with the existing provisions of EPIC that provide for payment of claims from the assets of revocable trusts when the probate estate is either nonexistent or inadequate to pay claims of a decedent.

## *Part 7*

Part 7 contains a series of default rules related to the office of trustee. The provisions include rules governing trustee acceptance, the rights and obligations of co-trustees, resignation, removal, and appointment of trustees, and trustee compensation.

## *Part 8*

Part 8 sets forth the duties of the trustee and the trustee's powers, including the trustee's duties of loyalty, care, to give notice of the trust and to account to beneficiaries<sup>3</sup>, and to control and keep records of trust property. This Part also contains a provision recognizing and regulating trust protectors.

## *Part 9*

Part 9<sup>4</sup> addresses the liability of trustees and beneficiaries' rights upon a breach of trust. These include provisions that identify remedies for breach of trust and potential defenses to breach of trust claims. Additional sections address trustee relationships to persons other than the beneficiaries. Unlike most of the other Parts, much of Part 9 *cannot* be modified by the person creating the trust instrument.

## *Other*

Several provisions connected to the implementation of the MTC will become part of Article VIII of EPIC.

In addition, approximately 38 sections of the rest of the Estates and Protected Individuals Code will require conforming changes.<sup>5</sup>

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<sup>3</sup> The provisions of the UTC dealing with notice of trusts and accountings were controversial. The Michigan Trust Code provision rejects the approach of the drafters of this UTC in this area and instead follows existing Michigan law in this area that is currently found in EPIC.

<sup>4</sup> The provisions found in Part 9 of the Michigan Trust Code originally made up Article 10 of the Uniform Trust Code. For reasons related to how the Michigan Compiled Laws are numbered, these provisions were assigned to Part 9 of the Michigan Trust.

<sup>5</sup> The existing 41 sections that now comprise Article VII of EPIC and which will be replaced by the MTC also must be deleted, bringing the number of EPIC sections affected by the MTC to over 75.

## **Conclusion**

Enactment of the Michigan Trust Code will represent a continuation of the process of modernizing the law of estates and trusts that began in Michigan in 1998 with the enactment of the Estates and Protected Individuals Code and continued with the adoption in 2005 of the Uniform Prudent Investor Act, and the repeal of the Rule Against Perpetuities in 2008. It represents a significant advance in the law of trusts and ensures that Michigan's citizens have a single source, comprehensive, modern body of law to govern an area of growing importance to Michigan's citizens, its legal and financial communities, and its courts.

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# THE MICHIGAN TRUST CODE: AN OVERVIEW

*Mark K. Harder*<sup>1</sup>

## I. Introduction

On June 21, 2008, the Council of the Probate and Estate Planning Section of the State Bar of Michigan overwhelmingly approved the Michigan Trust Code and recommended its adoption by the Michigan legislature. If enacted into law, the proposed Michigan Trust Code would provide the citizens of Michigan with a comprehensive codification of the law of trusts. In doing so, the Code would preserve much of our current statutory and common trust law and fill in many of the gaps of current law. It also represents a continuation of the modernization of Michigan's laws governing trusts and estates, which began in 1998 with EPIC and continued with the enactment of the Uniform Principal and Income Act in 2004 and the repeal of the Rule Against Perpetuities in 2008.

The Michigan Trust Code relies upon the structure and provisions of the Uniform Trust Code as the starting point for many of its provisions. However, the Michigan Trust Code, if enacted, will be a uniquely Michigan document that draws from both the Uniform Trust Code and existing Michigan law to preserve long established procedures, practices, and principles concerning trusts in Michigan while also filling the numerous gaps that exist in the law today.

These materials are intended to provide an overview of the Code.

## II. Background on the Uniform Trust Code

Because the Michigan Trust Code is based on the Uniform Trust Code, study of the Michigan Trust Code is helped by having familiarity with the UTC.

### A. Uniform Trust Code

According to the National Conference of Commissioners on Uniform State Laws (NCCUSL), the UTC was prepared to provide a comprehensive model for codifying the law of trusts. Although there are numerous Uniform Acts related to trusts, such as the Uniform Prudent Investor Act, the Uniform Principal and Income Act, the Uniform Trustees' Powers Act, the Uniform Custodial Trust Act, and parts of the Uniform Probate Code, none is comprehensive. Most states, including Michigan, do not have a single comprehensive body of trust law. Instead they rely on these fragmentary statutes and/or the Restatement (Second) of Trusts.<sup>2</sup> The UTC

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The author chairs the Michigan Trust Code Committee of the State Bar of Michigan Probate and Estate Planning Section. Except where otherwise noted, these materials describe the Michigan Trust Code as recommended by the Michigan Trust Code Committee and approved by the Council of the Probate and Estate Planning Section of the State Bar of Michigan on June 21, 2008. It also includes changes that have been incorporated into the Code as a result of comments received by the Michigan Probate Judges Association's *ad hoc* Committee on the Michigan Trust Code and from the Attorney General's Charitable Trust Section. These materials were prepared in February of 2009.

<sup>2</sup> See, e.g., *Hein v. Hein*, 214 Mich. App. 356, 359 (1995).

enables states that enact it to specify their rules on trusts with precision and provides individuals with a readily available source for determining their state's law on trusts.

The National Conference gave final approval to the UTC in 2000. The UTC was amended in 2001, 2003, 2004, and 2005 to reflect the input and decisions of some of the early states that reviewed the UTC and enacted it. The UTC also has received the approval of the ABA's Real Property, Probate and Trust Law Section and the American Association of Retired Persons.

## **B. States Adopting the UTC**

Promulgated in 2000, the UTC has steadily gained acceptance. The first state to enact the UTC was Kansas in May of 2002. Currently<sup>3</sup> the following states have enacted the UTC<sup>4</sup>:

Alabama	Arkansas
Arizona	District of Columbia
Florida	Kansas
Maine	Missouri
Nebraska	New Hampshire
New Mexico	North Carolina
North Dakota	Ohio
Oregon	Pennsylvania
South Carolina	Tennessee
Utah	Virginia
Wyoming	

In addition, UTC legislation is presently pending in the legislatures of Massachusetts, Oklahoma, and Connecticut. A number of additional states have committees studying the UTC for enactment in their states.

## **III. Michigan Trust Code**

### **A. Michigan Trust Code Committee**

In the Fall of 2003 the Council of the Probate and Estate Planning Section of the State Bar of Michigan authorized the formation of a committee to study the Uniform Trust Code. Initially the Committee consisted of five individuals. Fourteen members of the bar actively worked and contributed to the drafting of a Michigan Trust Code. Other members of the bar have provided assistance on specific issues or areas in which they have particular expertise. Members of the Committee included trust officers, elder law attorneys, professors of law, and estate planners from firms, large and small, throughout the state. A committee of members of the Michigan

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<sup>3</sup>For the latest on legislative adoptions, see NCCUSL's website, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-utc2000.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp).

<sup>4</sup> In addition, Iowa's Trust Code is based upon an early version of the Uniform Trust Code.

Bankers Association had its own parallel study of the UTC and MTC underway.<sup>5</sup> During the Michigan Trust Code Committee's drafting process the input of other constituencies, including the Michigan Probate Judges Association and the Department of the Attorney General, was solicited as well.

## **B. Key Issues and Principles**

The MTC Committee began meeting in late 2003. It was guided by several important, fundamental principles in its work.

### **The MTC will be a part of EPIC**

The MTC Committee believed that it will be best to place the MTC within EPIC. Michigan lawyers already are accustomed to consulting EPIC for most answers to questions addressing the administration of trusts. In addition, trusts increasingly are used as will substitutes and are the principal means to settle many decedents' estates. By incorporating a codification of trust law into EPIC, practitioners, judges, and citizens can look to a single unified body of law for answers to questions concerning the settlement of decedents' estates, whether in probate or outside of probate. The Michigan Trust Code would displace the current provisions of Article VII of EPIC.

### **Reconciling differences between existing Michigan law and the UTC**

On balance the Michigan Trust Code tends to preserve long standing Michigan law absent significant procedural or policy benefits from changing the law.

In all, thirty-two provisions of the Code have been identified as essentially consistent with either existing Michigan common law or current statutes. Another forty-eight sections of the Code involve sections of the UTC that have been modified or are sections that have been added, in either case so the Michigan Trust Code more closely follows existing Michigan common law or current statutes than what the UTC does. Only three provisions represent significant departures from current law.

Where Michigan's law and the UTC are substantively similar, the Michigan Trust Code tends to favor the UTC language if uniformity of language among the states might be advantageous.

### **Self-Settled Asset Protection Trusts**

Self-settled asset protection trusts are not part of the UTC, although Utah grafted on its version of the UTC provisions authorizing self-settled asset protection trusts. The Michigan Trust Code Committee was not charged with evaluating the appropriateness of their use in Michigan. Therefore, the Committee did not consider whether a Michigan Trust Code should permit or authorize self-settled asset protection trusts such as are permitted in Alaska or Delaware, and the Michigan Trust Code does not address this subject.

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<sup>5</sup> Two members of the Michigan Trust Code Committee served as liaisons between the MBA Trust Counsel Committee and the Probate Council on a variety of matters, and served on both the Probate Council's MTC Committee and the MBA Trust Counsel Committee that studied the UTC.

## **EPIC Review and Update**

Although the Michigan Trust Code will become an article within EPIC, and many conforming changes to EPIC have been recommended as a result of the Michigan Trust Code, the drafting of the Michigan Trust Code did not involve a general review or update of EPIC. The Michigan Trust Code Committee limited its efforts to ensuring that the balance of EPIC and the Michigan Trust Code are consistent with one another.

### **IV. Organization and Scope of the Michigan Trust Code**

The Uniform Trust Code is organized in eleven Articles. As previously noted, the Michigan Trust Code borrows the UTC's structure<sup>6</sup> and uses the UTC as its starting point for language.

#### **A. Part 1 – General Provisions and Definitions**

As its name suggests, Part 1 consists of a series of general provisions and one definitional section.<sup>7</sup>

**Section 7102 (Scope).** Section 7102 defines the scope of the Trust Code's application. This Section does so by making it applicable to trusts as defined under Section 1107(m) of EPIC.

**Section 7103 (Definitions).** Section 7103 contains definitions of key terms. Several new definitions have been added to the definitions found in the UTC. In addition, a number of definitions found in the UTC were deleted from the MTC because the terms were already defined as part of EPIC and the EPIC definitions will apply to the MTC.

**Section 7104 (Knowledge).** Section 7104 provides a definition of "knowledge."

**Section 7105 (Default and Mandatory Rules).** From a practitioner's perspective perhaps the most important provision in Part 1 is Section 7105. Section 7105 provides that the provisions of the Code are *default* rules, which can be varied by the settlor of the trust. However, Section 7105(2) enumerates a number of areas that are not variable by the settlor. Noteworthy among the provisions that cannot be varied by the settlor are the requirements that trusts be disclosed to their beneficiaries, the mandatory reporting requirements, and the trust protector provisions.

**Section 7107 (Governing Law).** Section 7107 addresses choice of law and provides that it is the law of the jurisdiction set forth in the trust agreement, or if none is provided the law of the jurisdiction having the most significant relationship to the trust, that governs the trust.

**Section 7108 (Principal Place of Administration).** Section 7108 defines the principal place of administration of trusts. The MTC permits the trustee to propose to transfer the principal place of administration without court approval and requires that written notice regarding the change be provided to the qualified trust beneficiaries. The trustee is free to do so after 63 days unless a

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<sup>6</sup> The article and section numbering conventions in this outline follow the numbering scheme proposed for the MTC. In general, the MTC numbering follows the UTC, except that it adds a "7" at the beginning of the section number to reflect that the provision will be in Article VII of the EPIC enabling act. For example, MTC section 7101 corresponds to UTC section 101. In addition, the MTC is divided into "parts", which correspond to the UTC's "articles."

<sup>7</sup> The Michigan Trust Code excludes Section 106 of the UTC. UTC Section 106 states that the common law of trusts and principles of equity supplement the Uniform Trust Code, except as modified by the Code or other law. This provision replicates Section 1203 of EPIC and therefore was deemed unnecessary.

beneficiary objects. If an objection is raised, the trustee will need to either cancel plans to transfer the principal place of administration or obtain court approval of the change. If no objection is raised, the transfer of the place of administration can freely occur. Settlers are free to draft their own rules as well.

**Section 7109 (Methods and Waiver of Notice).** Section 7109 provides for the methods of giving notice and waiver of notice. Electronic messages can constitute notice or waiver, although the message must be (1) properly directed, and (2) properly identified. This second requirement is an additional requirement not found in the UTC and is designed to address the problem of spam filters and together with the first requirement is designed to deal with the problems of giving notice to large institutional trustees.

**Section 7110 (Others Treated as Qualified Beneficiaries).** Section 7110 defines when someone will be treated as a “qualified beneficiary.” The Michigan Trust Code does not make the Attorney General a “qualified beneficiary” with respect to charitable trusts. Instead, it provides that the Attorney General possesses any rights it possesses under the Charitable Supervision of Trusts Act, MCL 14.251 *et seq.* In drafting the provision in this manner, the Michigan Trust Code Committee did not intend the Attorney General’s powers over trusts be expanded or contracted as a result of the Trust Code.<sup>8</sup>

**Section 7111 (Nonjudicial Settlement Agreements).** Section 7111 deals with nonjudicial settlement agreements. It should be noted that nonjudicial settlement agreements cannot be used to achieve termination or modification of trusts. These actions remain subject to the provisions found in Part 4. The Code adopts Section 7111 with revisions intended to permit court review and approval of agreements initiated by trustees as well as beneficiaries. This is consistent with the current law in Michigan. Unlike EPIC Section 1207, however, this provision applies to *nonjudicial* settlements among beneficiaries, which may be binding.

**Section 7112 (Rules of Construction).** UTC Section 7112 is an optional provision that would extend to trusts the rules of construction applicable to Wills. It was intended for adoption in states without rules of construction for trusts. Part 7 of Article II of EPIC currently has rules of construction that are applicable to trusts. However, the specific gift, ademption, and exoneration rules in EPIC sections 2605 through 2608 do not apply to trusts. The Michigan Trust Code incorporates these sections by reference and extends them to trusts.

**Section 7113 (Penalty Clause for Contest of Trust).** The Michigan Trust Code also includes a penalty clause provision applicable to trusts that is similar to EPIC sections 2518 and 3905. There is no UTC equivalent.

## **B. Part 2 – Judicial Proceedings**

Part 2 sets forth several provisions dealing with the courts and their relationship to trusts.

**Section 7201 (Role of Court in Administration of Trust).** Section 7201 permits the invocation of the court’s jurisdiction over trusts. This section was heavily edited, but does not represent a significant substantive change. The Section gives courts power over the administration of trusts and authorizes the courts to provide instructions to the parties to trusts. Consistent with

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<sup>8</sup> The Michigan Trust Code Committee also did not wish for the Trust Code to become a proxy or the source of a debate about the breadth or scope of the Attorney General’s powers with respect to charitable trusts.

Michigan's present law, Section 7201 also makes clear that trusts are not subject to continuing supervision by the courts. The edits were required to preserve trust registration principles of EPIC and to incorporate concepts embodied in Section 1302 of EPIC.

**Section 7202 (Jurisdiction over Trustee and Beneficiary).** Section 7202 grants courts personal jurisdiction over trustees and beneficiaries of trusts. It also grants the courts personal jurisdiction over individuals who improperly receive distributions from trusts. Like Section 7201, it was edited to incorporate the concepts of trust registration.

**Sections 7203 (Subject Matter Jurisdiction) and 7204 (Venue).** Section 7203 grants the court subject matter jurisdiction. Section 7204 provides for venue. The UTC considered these to be optional provisions. However, the Michigan Trust Code includes these provisions, with some cross references to the general provisions of EPIC and with modifications related to the matter of trust registration.

**EPIC Jurisdictional Provisions.** EPIC Sections 7203, 7204, 7205, and 7206, dealing with several jurisdictional matters, also have been made a part of Part 2 of the Trust Code as Sections 7205 through 7208.

**EPIC Trust Registration Provisions.** The UTC does not provide for trust registration. However, trust registration is consistent with the UTC and the Michigan Trust Code Committee determined trust registration has value to Michigan practitioners and citizens. The trust registration provisions now found in Sections 7101 through 7105 of EPIC are incorporated into Part 2 as Section 7209 through 7211 of the MTC.

### **C. Part 3 – Representation**

Part 3 deals with representation of beneficiaries in matters such as the receipt of notice and consent. Sections 7302 through 7304 deal with representation in circumstances when a court is not involved, and Section 7305 deals with representation in matters before the court.

These sections build from and closely track the representation provisions of the Uniform Probate Code, which are found in Sections 1209 and 1403 of EPIC. The Michigan Trust Code incorporates these sections in substantially the form presented, with some conforming changes to EPIC.

Due to their similarity to existing provisions of EPIC, the concepts embodied in this Part will be familiar to practitioners. However, current EPIC Sections 1209 and 1403 only apply in the context of judicial proceedings. One significant change Part 3 represents from current law is that it would be applicable at all times, not just when a judicial proceeding is ongoing. This means, for example, that notice and delivery of an accounting given to parents or guardians of minor children can be binding on the child. Alternatively, notice to the holder of a testamentary general power of appointment of the intention to move the principal place of administration may be sufficient to bind and cut off the rights of remainder beneficiaries to object.

Specifically the provisions of Part 3 are as follows:

**Section 7301 (Representation; Basic Effect).** Section 7301 is an introductory, general provision.

**Section 7302 (Representation by Holder of General Testamentary Power of Appointment).** Section 7302 deals with representation by holders of testamentary general powers of appointment.

**Section 7303 (Representation by Fiduciaries and Parents).** Section 7303 deals with representation by other fiduciaries (such as a personal representative).

**Section 7304 (Representation by Person Having Substantially Identical Interest).** Section 7304 provides for virtual representation, a concept introduced in Michigan law in Section 1403 of EPIC.

**Section 7305 (Appointment of Representative).** Section 7305 permits appointment of representatives of beneficiaries by the courts.

#### **D. Part 4 – Creation, Validity, Modification, and Termination of Trusts**

Part 4 consists of fifteen sections pertaining to the creation, modification and termination of trusts, including charitable trusts.

Sections 7401 through 7409 deal with the following issues related to the creation, validity, and purposes of trusts:

**Section 7401 (Methods of Creating Trust).** Section 7401 permits the creation of trusts following transfers of property in trust during lifetime, by will or other testamentary transfer, by declaration, or by exercise of a power of appointment in favor of a trustee. The Michigan Trust Code modifies the UTC version of this section slightly to also include creation of trusts by funding with an assignment of promises.

The list found in Section 7401 is not necessarily an exclusive list. See also Section 7102, which recognizes the creation of trusts by statute and court order. The Michigan Trust Code adds a paragraph to help deal with “dry” trusts. This provision can be considered a companion to EPIC Section 2511, which validates certain testamentary additions to trusts.

**Section 7402 (Requirements for Creation).** Section 7402 sets forth the requirements for establishing a trust. These include a settlor with an intention to create a trust, a definite beneficiary, and a trustee.<sup>9</sup> This section incorporates the common law doctrine of merger. The Michigan Trust Code does not include one provision found in the UTC version of Section 7402. The UTC provision expressly approved granting trustees the power to select a beneficiary from an indefinite class. The Michigan Trust Code does not include this provision. The Michigan Trust Code approach is consistent with current Michigan law and the majority view within the United States. Other conforming changes were made to cross reference the section to Section 2722 of EPIC.<sup>10</sup>

**Section 7403 (Trusts Created in Other Jurisdictions).** Section 7403 deals with the validity of foreign trusts under the laws of this state. The Michigan Trust Code includes this provision without change. It recognizes nontestamentary trusts if they are valid in the jurisdiction in which

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<sup>9</sup> The capacity required for revocable trusts is provided for in UTC Section 601. The Trust Code is silent on the capacity required for irrevocable trusts.

<sup>10</sup> Some conforming changes were also proposed to EPIC Section 2722, which deals with honorary trusts and trusts for pets.

the trust instrument was executed. Nontestamentary trusts also will be recognized if they were valid under the law of the jurisdiction in which the settlor was domiciled, had a residence or was a citizen, the trustee was domiciled or had a place of business, or where any trust property is located.

**Section 7404 (Trust Purposes).** Section 7404 requires that trusts be for a lawful purpose, not be contrary to public policy, and be possible to achieve. The Michigan Trust Code deletes a UTC requirement in UTC Section 404 that the trust be for the benefit of the beneficiaries. This requirement was an addition to the law of trusts when the Restatement (Third) of Trusts was adopted and its implications and meaning are new and untested. As a result it was not incorporated into Michigan law.

**Section 7405 (Charitable Purposes; Enforcement).** Section 7405 recognizes charitable trusts and authorizes the courts to select a charitable purpose or beneficiary if no purpose is clear. The Michigan Trust Code includes a provision granting Settlers and named beneficiaries the right to maintain proceedings to enforce charitable trusts. Granting Settlers the right to enforce charitable trusts would represent a change in Michigan law, which presently allows only the Attorney General to enforce charitable trusts.

**Section 7406 (Creation of Trust Induced by Fraud, Duress, or Undue Influence).** Section 7406 invalidates trusts induced by fraud, duress, or undue influence.

**Section 7407 (Evidence of Oral Trusts).** Section 7407 recognizes oral trusts. However, in doing so, the creation and terms must be established by clear and convincing evidence.

**UTC Sections 408 (Trust for Care of Animal) and 409 (Noncharitable Trust Without Ascertainable Beneficiary).** UTC Sections 408 and 409 deal with subjects embodied in EPIC Section 2722, and deal with them in a similar manner to the current EPIC provisions. As a result, the Michigan Code excludes these UTC sections and preserves the current EPIC Section 2722, with some minor modifications.

Sections 7410 through 7417 focus upon issues related to modification and termination of trusts.

**Section 7410 (Modification or Termination of Trust; Proceedings for Approval or Disapproval).** Section 7410 provides the default rule for when trusts are terminated. It supplements the rules set forth in Sections 7411 through 7414. In addition, Section 7410 confirms that trustees or beneficiaries may commence proceedings to approve or disapprove the modification or termination of trusts. The provision in UTC Section 410(b) permitting Settlers to bring proceedings to approve or disapprove a modification or termination of a trust under Section 7411 was excluded out of concerns for the effect such a provision might have under transfer tax rules.

**Section 7411 (Modification or Termination of Noncharitable Irrevocable Trust by Consent).** UTC Section 411(a) deals with the modification and termination of noncharitable irrevocable trusts.<sup>11</sup>

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<sup>11</sup> UTC Section 411 as originally written attracted a great deal of criticism because of a concern that it would create estate tax inclusion problems for irrevocable gift trusts under Internal Revenue Code Sections 2036 and 2038. The estate tax concern that arose was that the retained power of a settlor under Section 411(a) to consent to the termination of a trust was a retained or held power under IRC Sections 2036 and 2038, thereby causing the inclusion



The Michigan Trust Code includes a version of UTC Section 411(a) that permits courts to approve the termination or modification of the trust upon petition of the current income and vested remainder beneficiaries when continuance is not necessary to achieve a material purpose of the trust. Section 7411(1) is also prospective only. The Michigan Trust Code Committee did not intend the adoption of this provision to be in derogation of existing Michigan law, which permits settlors and beneficiaries to agree to termination of a trust with court approval. See *Hein v. Hein*, 214 Mich. App. 356 (1995).

The Code also recognizes the authority of trust protectors, alone or with the beneficiaries, to terminate trusts when the trust instrument so provides.

Section 7411(2) defines the parties to whom notice must be given of proceedings to terminate or modify a trust. The persons to whom notice must be given include the settlor if alive, the trust protector if one exists, anyone provided for in the trust instrument, agents under powers of attorney, and conservators.

UTC Section 411(c) states that spendthrift provisions are not presumed to be a material purpose of the trust. A substantial number of states declined to include UTC Section 411(c) and it is now optional, although NCCUSL still recommends its inclusion.<sup>12</sup> The Michigan Trust Code Committee concluded that despite the widespread use of spendthrift provisions, settlors in fact consider these clauses material and spendthrift protection often is an essential reason for establishing a trust. Based on the Committee's experience the Michigan Trust Code deletes UTC Section 411(c), thereby avoiding the need to specially elevate the importance of spendthrift provisions.

Section 7411(4) also permits the courts to approve the modification or termination of a trust if the court is satisfied that if the trustee and all beneficiaries had consented the court would have

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of the assets of the trust in the decedent's estate for estate tax purposes. Following the 2004 amendments, Section 411(a) of the UTC can be configured in at least four ways:

- **Default to Pre-UTC Law.** Section 411(a) can be excluded. This means the state's prior law on the modification and termination of noncharitable irrevocable trusts would govern.
- **Adopt Section 411(a) as Originally Written.** Section 411(a) as originally written allowed noncharitable irrevocable trusts to be modified or terminated upon the consent of the settlor and all beneficiaries. It can still be adopted in this form.
- **Require Court Approval.** Section 411(a) can be written to provide that noncharitable irrevocable trusts can be terminated with court approval and the consent of the settlor and all the beneficiaries. The law in Michigan appears to be consistent with this alternative form of drafting Section 411(a). See *Hein v. Hein*, 214 Mich. App. 356, 359 (1995) ("...we hold that a court may terminate an irrevocable spendthrift trust without the consent of the trustee where the settlor and all the beneficiaries consent to its termination.")
- **Make Section 411(a) Prospective Only.** A fourth variation within Section 411(a) makes it applicable only to trusts that become irrevocable after the enactment of the UTC.

<sup>12</sup> The drafters of the UTC believed that spendthrift provisions in trusts are now so standard that they are rarely considered by settlors and that it is therefore not appropriate to presume that settlors intend these clauses to be material purposes of trusts.

the power to do so under Section 7411(1) and that the interests of any beneficiary who does not consent will be adequately protected.

**Section 7412 (Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively).** Section 7412 permits courts to modify or terminate trusts due to unanticipated circumstances. Section 7412(1) would permit modification of *administrative provisions* if continuation on existing terms would be impracticable, wasteful or would impair trust administration. Section 7412(2) would permit modification of *administrative or dispositive* terms or termination of a trust if due to a change in circumstances not anticipated by the settlor the termination or modification will further any stated purposes or if none, the Settlor's probable intentions.

**Section 7413 (Cy Pres).** Section 7413 codifies the *cy pres* doctrine. The *cy pres* rules in Michigan actually are fairly well established by court decisions, which follow the traditional formulation of the *cy pres* rules.<sup>13</sup> The Michigan Trust Code includes UTC Section 413 with a number of modifications to conform to the Michigan common law.

**Section 7414 (Modification or Termination of Uneconomic Trusts).** Section 7414 specifically authorizes the modification or termination of uneconomic trusts. The Michigan Trust Code sets the threshold for termination at \$50,000 and adjusts this amount for inflation in the manner provided for amounts under EPIC, such as the family allowance amount. The Michigan Trust Code directs the distribution of the assets of small trusts to the current beneficiaries if no manner is provided for in the trust instrument.

**Section 7415 (Reformation to Correct Mistakes).** Section 7415 permits trust reformation to cure mistakes of fact or law.

**Section 7416 (Modification or Termination to Achieve Settlor's Tax Objectives).** Section 7416 authorizes modification of a trust to achieve the settlor's tax objectives.

**Section 7417 (Combination and Division of Trusts).** Section 7417 permits the combination and division of trusts if doing so does not impair the rights of the beneficiary or adversely affect the achievement of trust purposes. EPIC Sections 7401(2)(ff) and 7401(3) contain similar provisions. The Michigan Trust Code transfers the similar EPIC provisions from the powers provisions and would place them in a modified Section 7417 in essentially the same form as now provided by Michigan law.

## **E. Part 5 – Creditor's Claims; Spendthrift and Discretionary Trusts**

Part 5 deals with the relationships to the trust of creditors of beneficiaries of trusts, the enforceability of spendthrift provisions, and the effect of discretionary distribution powers.

The Michigan Trust Code Committee was guided in its efforts by several key principles:

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<sup>13</sup> See *In re Rood Estate*, 41 Mich App 405 (1972); *In the Matter of the Estate of Mame Estes*, 207 Mich App 194 (1994).

- The common law in Michigan regarding creditors' rights is well established and closely follows the traditional statement of the law as found in the Restatement (Second) of Trusts.
- The Michigan Trust Code Committee liked the current common law.
- Because of (1) the general satisfaction with the existing common law, (2) the Michigan Trust Code Committee's practice to not change well established Michigan law involving trusts, and (3) concerns about how the UTC and Restatement (Third) of Trusts deal with some of these topics, the Michigan Trust Code Committee did not support adopting the changes in the law found in the UTC version of Part 5.
- The Michigan Trust Code Committee agreed there are some issues where Michigan law is not well developed and should be addressed.
- Michigan has very favorable common law in the area of special needs trusts that should not be disturbed.

As drafted by the Michigan Trust Code Committee, Part 5 of the Michigan Trust Code relies on the Restatement (Second) of the Law of Trusts and provides as follows:

**Section 7501 (Application; general provisions).** This section describes the scope of the Part.

**Section 7502 (Spendthrift provisions).** This section recognizes and validates spendthrift provisions and provides that they restrain the voluntary and involuntary transfer of the beneficiary's interest. Subject to exceptions in sections 7504, 7506, and 7507, an interest in a spendthrift trust cannot be transferred and the trust assets are not subject to a beneficiary's creditor's claim unless and until property is distributed directly to the beneficiary.

**Section 7503 (Trust for support).** Subject to exceptions in sections 7504, 7506, and 7507, interests in support trusts also are not subject to the claims of the beneficiary's creditors until distributed directly to the beneficiary. Trust assets in excess of what is needed for support cannot be attached by creditors of the beneficiary.

**Section 7504 (Exceptions to spendthrift provision or trust for support).** This section provides exceptions to the protections of spendthrift trusts and support trusts for child support claims and for judgments of creditors providing services that enhance, preserve, or protect a beneficiary's interest in a trust, but funds can be reached only as they become due. This provision does not apply to discretionary trusts.

**Section 7505 (Discretionary trusts; effect of standard).** In the case of a discretionary trust a creditor only has the right to receive payments when and as made by the trustee directly to the trust beneficiary.

**Section 7506 (Creditor's claim against settlor).** This section is derived from UTC section 505. It codifies the common law rule that creditors may reach assets of the debtor's revocable trust and after death the claims of creditors may be pursued against revocable trusts in the same manner as is now permitted under Part 5 of Article VII of EPIC with respect to revocable trusts.

This section also contains provisions designed to address potential problems arising from the use of common tax planning provisions.<sup>14</sup> The section makes clear that the lapse, waiver, or release of a withdrawal power (*i.e.*, a Crummey withdrawal right) does not make the holder of the withdrawal power a settlor. The section also confirms that individuals who create lifetime QTIP trusts for his or her spouse, but retain a secondary life estate if the spouse predeceases the settlor, is not considered a settlor for purposes of creditor claims. This avoids such trusts being considered “self settled” trusts. This will conform the treatment of these trusts for creditor purposes to the tax treatment of these trusts for tax purposes.

**Section 7507 (Overdue distribution).** This section is UTC Section 506 and provides that if a beneficiary has a right to receive a distribution, a creditor cannot be evaded by unreasonably delaying distribution from the time it is due.

**Section 7508 (Personal obligations of trustee).** This section is UTC Section 507 and states a basic principle of trust law that property held subject to a trust is not subject to the trustee’s creditors.

## **F. Part 6 – Revocable Trusts**

Part 6 deals with revocable trusts. In the words of the Reporter to the UTC, “because of the widespread use in recent years of the revocable trust as an alternative to a will, this Part is one of the more important Parts of the Code. This Part and the other Parts of the Code treat the revocable trust as the functional equivalent of a will.”<sup>15</sup>

**Section 7601 (Capacity of Settlor Revocable Trust).** Section 7601 states that the capacity to create, amend, revoke, or add property to a revocable trust or to direct the actions of a trustee is the same as that required to make a Will.

To the extent this section departs from Michigan law, it represents one of a small number of places in the Trust Code where the Code does so. However, all of the UTC states have adopted this provision intact and the trend clearly is to make the standard of capacity for revocable trusts the same as that required to make a will.<sup>16</sup> The basis for clearly adopting the standard of capacity required to make a will the standard of capacity to create a revocable trust is the widespread use of revocable trusts as will substitutes and a desire to have a common standard for the principal means of testamentary transfers. As discussed below, the standard of capacity to make a will is being modified. The new standard of capacity will be similar to the standard of capacity required to execute common estate planning documents such as powers of attorney and beneficiary designations.

**Section 7602 (Revocation or Amendment of Revocable Trust).** Section 7602 states the general rule that trusts created after the effective date of enactment of the Code are revocable and

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<sup>14</sup> In conjunction with the provisions described in this paragraph of these materials, conforming changes also will be needed to the Michigan Powers of Appointment Act, MCL sections 556.111 *et seq.*, the Michigan Uniform Fraudulent Transfer Act, MCL sections 566.31 *et seq.*, and MCL section 566.131.

<sup>15</sup> UTC Article 6, General Comment.

<sup>16</sup> The standard for capacity to create a revocable trust is not clear under Michigan law. Many understand or believe that the standard of capacity required is that required to enter into a contract. However, at least one unpublished Michigan court of appeals case, *Sigmund v McClafferty*, 2006 Mich App Lexis 2387, applied the same standards to judge both a will and a trust.

amendable unless the trust instrument states otherwise. It also provides for how revocation or amendment occurs, and the powers others (such as an agent under a power of attorney or conservator) may have to exercise the settlor's powers. The Michigan Trust Code departs from the UTC version of this section by requiring written amendments to a trust established under a written instrument. Section 7602 also addresses the process of amendment or revocation of trusts created by two or more persons. The Michigan Trust Code adds to the UTC version of this section a requirement that trustees furnish notice to other settlors of any revocation or amendment by a settlor of a trust with more than one settlor.

**Section 7603 (Settlor's Powers; Powers of Withdrawal).** Section 7603 makes clear that while a trust is revocable, the rights of the beneficiaries are subject to the rights of the settlor, and the trustee's duties are owed exclusively to the settlor. Under the UTC, states are free to provide that if a settlor becomes incapacitated, the trustee's duties run to the beneficiaries. The Michigan Trust Code does not include this optional language in UTC Section 603. Instead, the Michigan Trust Code continues the current requirements found in EPIC 7303(1) and (2) as part of Section 7603. This modification requires the trustee of a revocable trust to deliver information about the trust to either an incapacitated settlor's agent or the beneficiaries if either no agent exists or the sole agent is a trustee.

**Section 7604 (Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property).** Section 7604 provides finality to the question of when a contest to a revocable trust may be brought. The Michigan Trust Code provides for an end to contests upon the earlier of two years after the settlor's death or six months after the trustee sends notice of the trust's existence, relevant portions of the terms of the trust that describe or affect the person's interest, the trustee's name and address, and the time allowed for commencing a proceeding to contest the trust. This notice was based upon the required disclosures under Section 7814 (which in turn correspond to current Section 7303 of EPIC). It also provides protection to trustees administering the trust and distributing trust property without knowledge of any pending contest or plans to bring a contest of the trust. The provision also obligates beneficiaries to return any distributions received if the trust is later determined to be invalid.

**Sections 7605 through 7611 (Claims Procedures).** The Michigan Trust Code incorporates into Part 6 the current provisions found in Part 5 of Article VII of EPIC. These provisions establish a mechanism for a decedent's creditors to bring their claims against the decedent's revocable trust if there is no probate proceeding.

## **G. Part 7 – Office of Trustee**

Part 7 contains a series of default rules related to the office of trustee. The provisions include rules governing trustee acceptance, the rights and obligations of co-trustees, resignation, removal, and appointment of trustees, and trustee compensation.

**Section 7701 (Accepting or Declining Trusteeship).** Section 7701 states how trusteeships are accepted or declined. Acceptance of a trusteeship requires an affirmative act in order to assume the office of trustee, and failing such, a nominated trustee is deemed to have rejected the office.

**Section 7702 (Trustee's Bond).** Section 7702 gives courts the authority to order a bond if necessary to protect the interests of beneficiaries or if it is required under the trust. However, as a general rule, bonds are not used or required.

**Section 7703 (Cotrustees).** Section 7703 contains most of the Code's provisions dealing with co-trustees. Addressed in this section are provisions that allow a majority of the co-trustees to bind the trust,<sup>17</sup> that permit delegation among co-trustees without court approval, and that describe the duties of one trustee when another co-trustee breaches the trust.

**Section 7704 (Vacancy in Trusteeship; Appointment of Successor).** Section 7704 deals with vacancies in the office of trustee and appointment of successors. These are default rules to deal with situations in which the settlor of the trust fails to address the matter in the trust instrument. The Michigan Trust Code removes a default provision of the UTC allowing beneficiaries of noncharitable trusts to appoint a trustee. Settlor are free to confer this power, however, if they wish to provide for it in the trust instrument.

**Section 7705 (Resignation of Trustee).** Section 7705 allows the trustee to resign with notice to the beneficiaries and co-trustees.

**Section 7706 (Removal of Trustee).** Section 7706 permits the settlor, a co-trustee, or a beneficiary to petition the courts to remove a trustee for breach of trust or if there is a lack of cooperation among cotrustees that substantially impairs administration of the trust. Trustee also may be removed where doing so is in the best interests of the beneficiaries, if there is unfitness, unwillingness or a persistent failure to administer the trust or there is a substantial change in circumstances and removal is not inconsistent with a material purpose of the trust.

**Section 7707 (Delivery of Property by Former Trustee).** Section 7707 addresses the transition of the custody of property from a former trustee to the new trustee. The provision makes clear that a former trustee who has resigned or been removed has the duties and powers necessary to protect the trust property, and is obligated to expeditiously deliver the property to the persons next entitled to it.

**Section 7708 (Compensation of Trustee).** Section 7708 makes clear that trustees are entitled to reasonable compensation for their service as trustee. It does not attempt to define how this is to be determined nor does it seek to vary current law in any fashion.

**Section 7709 (Reimbursement of Expenses).** Section 7709 also permits reimbursement of expenses incurred by a trustee, with interest if appropriate, and gives the trustee a lien against trust property if expenses were incurred to protect trust property. The Michigan Trust Code adds a paragraph to the UTC version of this section to make clear that advances and reimbursements of expenses are not considered acts of self-dealing or a breach of trust.

## **H. Part 8 – Duties and Powers of Trustee**

Part 8 sets forth the duties of the trustee and the trustee's powers.

UTC Sections 804, 805, 806, and 807 contain provisions that parallel Michigan's Prudent Investor Rule, and the Michigan Trust Code does not include these sections, although some minor changes have been recommended to the Prudent Investor Rule to incorporate some elements of the UTC provisions.

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<sup>17</sup> Because the UTC is generally a default statute, this rule can be varied by the settlor.

**Section 7801 (Duty to Administer Trust).** Section 7801 describes the basic duties of the trustee: to administer the trust in good faith, in accordance with its terms and purposes, for the benefit of the beneficiary, and in accordance with the Michigan Trust Code.

**Section 7802 (Duty of Loyalty).** Section 7802 states the trustee's duty of loyalty, and a number of exceptions or limitations to the rule.<sup>18</sup>

- **General Rule.** The general rule is in Section 7802(2), and entitles beneficiaries to void transactions tainted by conflicts of interest without further inquiry unless approved by the trust terms, a court, was consented to or ignored by the beneficiary, or predates the trustee's acceptance of the office.
- **Related Parties.** Under Section 7802(3) transactions between the trustee and the trustee's spouse, family, attorneys or agent, or corporations owned or controlled by the trustee are presumptively affected by a conflict of interest, and therefore voidable by the beneficiaries.
- **"Corporate Opportunity Doctrine."** Section 7802(4) incorporates the concepts embodied in the corporate law under the "corporate opportunity doctrine" in trust law.
- **Investment Matters.** Section 7802(5) is an exception to the "no further inquiry rule" under Section 7802(2), and permits the trustee to invest trust property in funds managed by affiliates of the trustee. The section further permits the trustee to receive compensation from the investment company for investment advisory or management services, provided notice of the rate and method of compensation is given to the beneficiaries entitled to receive annual reports of the trust.
- **Voting Power.** Under Section 7802(6) trustees must vote shares or exercise ownership or control over stock or business enterprises in the beneficiaries' best interests.
- **Exceptions.** Section 7802(7) provides several exceptions to the general duty of loyalty, provided the transaction is fair to the beneficiaries. These exceptions relate to setting the terms of the appointment and compensation of trustees, transactions between fiduciary estates if the fiduciary serves each of them, and the deposit of funds at an institution operated by the trustee.

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<sup>18</sup> UTC Section 802(d) states that transactions outside of the trust relationship between a beneficiary and the trustee where the trustee is in a position of significant influence over the beneficiary are voidable by the beneficiary unless the trustee proves they are fair to the beneficiary. The Code does not include this provision, because it represents an unwarranted reach of the trust code into relationships extending beyond the trust.

UTC Section 802(i) authorizes the courts to appoint special trustees to make decisions that would involve a conflict of interest if the trustee undertook the matter on its own. However, EPIC section 1309(a) grants this power. Because the Michigan Trust Code would become part of the EPIC enabling statute, UTC Section 802(i) is unnecessary and was deleted.

**Section 7803 (Trustee's Standard of Care and Performance).** Although also embodied in the Prudent Investor Act, the Code includes Section 7803 as an independent obligation of trustees.

**Section 7808 (Powers to Direct).** Section 7808(1) makes clear that a trustee of a trust, where the settlor holds a power of revocation, may follow the direction of the settlor, even if inconsistent with the trust's terms. This is consistent with UTC Section 603.

**Section 7809 (Trust Protectors).**<sup>19</sup> This section ratifies the use of trust protectors. Trust protectors are believed to be in widespread use in Michigan. However, Michigan has no law governing them, and the Restatements (Second) and (Third) of the Law of Trusts offer relatively little guidance. Thirty-two states, including all of the UTC states, have adopted either the UTC provisions regarded directed trusts or have specialized trust protector legislation or both. The Michigan Trust Code includes a section that is conceptually similar to UTC Section 7808(b) through (d). There are important distinctions, however. First, under the MTC trust protectors are fiduciaries, unless their power is a power of administration within the meaning of Section 675(4) of the Internal Revenue Code. In addition, this provision cannot be modified by the settlor.

**Section 7810 (Control and Protection of Trust Powers).** Section 7810 requires the trustee to take reasonable steps to control and protect trust property.

**Section 7811 (Recordkeeping and Identification of Trust Property).** Section 7811 requires the trustee to maintain adequate records, separate the trust assets from the trustee's own property, maintain title in the name of the trust, and permits joint investments or pooling provided adequate records are maintained of the respective interests. The Michigan Trust Code includes a number of changes in an attempt to clarify aspects of these duties.

**Section 7812 (Enforcement and Defense of Claims).** Section 7812 directs trustees to take reasonable steps to enforce and defend claims involving the trust.

**Section 7813 (Collecting Trust Property).** Section 7813 requires trustees to take reasonable steps to compel former trustees to deliver property to the trustee. The Michigan Trust Code excludes a requirement found in the UTC version of this Section that obligates a trustee to redress breaches of trust by predecessors. Settlers are free to impose this requirement, but the Michigan Trust Code does not because its inclusion would discourage trustees from accepting trusts if they were obligated to pursue all predecessors, particularly because breaches might not be known at the time of accepting the trusteeship. The Michigan Trust Code also makes clear a former trustee may keep a reasonable reserve following resignation or removal to pay debts, expenses, and taxes.

The Michigan Trust Code carries over to Section 7813 existing provisions of EPIC that require a person who improperly received trust property to return it to the trust and a double damages provision if a person wrongfully embezzles, converts, or refuses to transfer property.

**Section 7814 (Duty to Inform and Report).** Section 7814 obligates trustees to keep beneficiaries informed about the trust administration; to furnish beneficiaries with a copy of the trust instrument; to give notice of the trustee's status as trustee and of the creation of the trust;

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<sup>19</sup> The UTC places its trust protector or directed trustee provision within Section 808. The Michigan Trust Code bifurcates this provision, so that the trust protector provision comprises Section 7809. The remaining sections of Article 8 have been renumbered from their UTC counterparts.



and to provide information regarding the trustee's compensation. In addition, the trustee must periodically report to the beneficiaries concerning the administration of the trust. The section describes in detail the nature of the report periodically provided.

The Michigan Trust Code adopts the conceptual approach to disclosing trusts, providing information about the trust status, and accountings that is found in EPIC Section 7303 be continued. These provisions were thoroughly debated within recent years and the approach appears to be generally accepted. This means, therefore, that the existence of the trust, the identity of the trustee and its address, and a copy of the trust instrument must be provided to the beneficiaries. However, the settlor of a trust is free to limit the group that receives annual accountings. The provisions in EPIC Section 7303, as recently amended, describing the contents of annual accountings were based on UTC Section 7813, and these provisions also were carried over to Section 7814 of the Michigan Trust Code.

**Section 7815 (Discretionary Powers; Tax Savings).** Section 7815 clarifies that a trustee's discretionary powers must be exercised in good faith and in accordance with the trust's purposes and the beneficiaries' interests. In addition, this section includes tax curative provisions designed to prevent inadvertent and adverse estate or gift tax consequences.

**Sections 7816 and 7817 (Powers).** Sections 7816 and 7817 set forth the general and specific powers of the trustee. Section 7816 sets forth the general rule. The Michigan Trust Code departs from the UTC version of Section 7817. Instead it relies upon the provisions of Section 7401 of EPIC for the specific powers.

**Section 7818 (Trustee Authority Regarding Environmental Matters).** The Michigan Trust Code includes a Section 7818 dealing with environmental matters that follows EPIC Section 7407.

**Section 7819 (Trustee Authority Regarding Tax Matters).** The Michigan Trust Code also includes a Section 7819 based on EPIC 7408 dealing with the trustee's authority over tax matters. The UTC has a less comprehensive tax provision in its version of Section 7817.

**Section 7820 (Payment Provision).** The Michigan Trust Code also includes a Section 7820 based on EPIC's facility of payment provision found in Section 7409. The UTC equivalent was less comprehensive and so the Code includes a separate provision based on EPIC Section 7409.

**Section 7821 (Distributions Upon Termination).** Michigan Trust Code Section 7821 is based on UTC Section 817 and would govern the distribution of trust property upon termination of the trust. Section 7821(1) is based upon Uniform Probate Code Section 3-906(b) and therefore is similar to Section 3908 of EPIC.

## **I. Part 9 – Liability of Trustees and Rights of Persons Dealing with Trustee**

Part 9<sup>20</sup> addresses the liability of trustees and beneficiaries' rights upon a breach of trust. Sections 7901 through 7909 identify remedies for breach of trust, with Sections 7905 through 7909 dealing with potential defenses to breach of trust claims. Sections 7910 through 7913

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<sup>20</sup> Because of the requirements for numbering sections within the Michigan Compiled Laws, the provisions that make up Article 10 of the UTC have been moved to Part 9 of EPIC. The UTC did not include an Article 9, which was reserved for the Prudent Investor Rule in states that had not otherwise enacted it. As a result there was "space" for Part 9 to be used to include the analogous provisions of UTC Article 10.

address trustee relationships to persons other than the beneficiaries. Unlike most of the other Parts, much of Part 9 *cannot* be modified by the settlor during the drafting of the trust instrument.<sup>21</sup>

**Section 7901 (Remedies for Breach of Trust).** Section 7901 gives the court a broad range of remedies for breach of trust, including specific performance, injunction, damages, orders to account, appointment of a special fiduciary, suspension or removal of a trustee, reduced compensation, imposition of a variety of other equitable relief, or such additional relief as the court sees fit.

**Section 7902 (Damages for Breach of Trust).** Section 7902 provides for damages for breach of trust. Section 7902(1) represents an expansion of Michigan law, which up to now has rejected market damages.<sup>22</sup>

**Section 7903 (Damages in Absence of Breach).** Section 7903 holds trustees accountable for profits made from administration of the trust. The Michigan Trust Code makes clear this does not apply to profits earned from compensation or reimbursement of expenses or to fees paid to affiliated entities of bank trust departments as has been permitted since January 2007 under the Banking Code. The Michigan Trust Code also expands the protection against loss or depreciation of trust assets (when not accompanied by a breach of trust) to a failure to generate income.

**Section 7904 (Attorney's Fees and Costs).** Section 7904 gives the courts the right to assess attorney fees and costs as part of the relief for disputes involving the trust. The Michigan Trust Code includes several modifications to the UTC version of this section. The Michigan version of Section 7904(a) limits awards from the trust only when the matter enhances, preserves, or protects the trust. The provision, as modified, follows the law in *Becht v Miller*, 279 Mich 629 (1937), and *In re Estate of Temple*, 278 Mich App 122 (2008). In addition, the Code provides for reimbursement of a trustee who defends or prosecutes a matter in good faith, unless it involves a breach of trust for which a court orders relief described in Section 7902(2).

**Section 7905 (Limitation of Action Against Trustee).** Section 7905 establishes a period of limitation for claims for breaches of trust. In general the rule limits claims to within one year after a report is sent to the beneficiary if the report would put the recipient on notice of the claim; otherwise claims must be brought within five years of the removal, resignation, or death of a trustee, termination of the beneficiary's interest or termination of the trust, whichever is first to occur.<sup>23</sup> This provision is very similar to EPIC Section 7307, which was amended in its current form in 2004 and was based on UTC Section 1005.

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<sup>21</sup> Section 7105 makes Section 7908 mandatory, and makes Sections 7910, 7911, 7912, and 7913 mandatory with respect to the rights of persons other than a trustee or beneficiary. In addition, the UTC prohibits settlors from varying periods of limitation and the power of the court to take such action and exercise such jurisdiction "as may be necessary in the interests of justice." UTC Section 105(b)(10)-(14).

<sup>22</sup> UTC Section 1002(b) granted trustees rights of contribution from other trustees. The Michigan Trust Code deletes this paragraph because it is in conflict with Michigan statutes abolishing joint and several liability, MCLA 600.2956, and has trustees rely on contribution rights found under common law.

<sup>23</sup> The Michigan Trust Code adds an additional provision to prevent beneficiaries who waive reports from bringing claims more than one year after the claim arises. This is designed to prevent beneficiaries from waiving reports and effectively gaining an extended period of limitations as a result of their own waiver of the right to receive the report.

**Sections 7906, 7907, and 7909 (Limitations of Liability for Trustees).** Sections 7906, 7907, and 7909 limit the liability of trustees who reasonably rely on the trust instrument for events not known to the trustee if the trustee exercised reasonable care to ascertain the happening of the events, and for events consented to or ratified by the beneficiary unless induced by improper conduct by the trustee or the beneficiary's lack of knowledge of the material facts related to the breach. UTC Section 1009 would create an exception to the consent or waiver of a beneficiary's rights when the beneficiary did not know of his or her rights. The Michigan Trust Code removes this exception and thereby places the burden of knowing one's rights on the beneficiary.

**Section 7908 (Exculpation of Trustee).** Section 7908 limits the ability of the settlor to exculpate trustees in drafting the instrument. The Michigan Trust Code deleted UTC Section 1008(b), which invalidates exculpatory provisions drafted or caused to be drafted by the trustee. The Michigan Trust Code also adds language approving and validating clauses that relieve trustees from liability for breaches of trust involving the acquisition or retention of particular assets at the direction of the settlor.

Sections 7910 through 7912 address the trustee's liability to third parties for acts arising out of the trust.

**Section 7910 (Limitation on Personal Liability of Trustee).** UTC Section 1010 addresses many of the same principles as EPIC Section 7306. Because of this, the Michigan Trust Code carries over the provisions of EPIC 7306 to this Section.

**Section 7911 (Interest as General Partner).** Section 7911 addresses the possibility of the trustee serving as general partner in a partnership. A trustee holding an interest as a general partner, whether in a general or limited partnership, has liability limited to the trust's assets, provided the fiduciary capacity is known to the other party to a contract or in the case of a limited partnership is disclosed by a filing under Section 202 of the Uniform Limited Partnership Act within the time permitted (60 days of acquiring an interest). The Michigan Trust Code does not include an attribution provision that many states have rejected as part of UTC Section 1011(c). This subsection would have deprived trustees of their limited liability when holding general partnership interests in any other capacity or if the trustee's spouse or a family member holds a general partner interest.

**Section 7912 (Protection of Person Dealing with Trustee).** Section 7912 protects persons (other than beneficiaries) who assist a trustee with a transaction and persons (other than beneficiaries) who transact for value with the trustee. In each case third parties who do so in good faith and without knowledge are protected if the transaction is subsequently determined to have been beyond the trustee's authority and is not required to inquire into the extent of their powers.

**Section 7913 (Certification of Trust).** Section 7913 helps protect the privacy of trust terms by providing for and encouraging the use of Certificates of Trust. This provision sets forth a minimum standard for Certificates of Trust. To discourage third parties from insisting upon receipt of a full copy of the trust instrument, it makes the third parties liable for damages if the person does not act in good faith in demanding a copy of the trust. This provision also protects third parties who act in reliance upon Certificates of Trust. This Section does not displace the provision included in Act 133 of 1991, MCLA 565.431, authorizing certificates of trust in the context of real estate transactions.

## **J. Miscellaneous Provisions**

Article 11 of the UTC contains several provisions connected to the implementation of the UTC. These will become Part 2 of Article VIII of EPIC.

**Section 8201 (Uniformity of Application and Construction).** UTC Section 1101 encourages uniformity of interpretation among the states. The Michigan Trust Code eliminates this section, but includes an alternative provision that describes the purposes of the Michigan Trust Code as establishing a comprehensive trust code, permitting expansion of trust practices, and providing certainty.

**Section 8202 (Electronic Records and Signature).** Section 8202 preempts the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

**Implementation Provisions.** Sections 8203, 8204, 8205, and 8206 deal with severability of the provisions of the Code, the effective date, the repeal of other statutes, and application to existing trusts.

## **L. EPIC Conforming Changes**

In connection with the drafting of the Michigan Trust Code, conforming changes to EPIC were also prepared. Many of the changes are conforming changes to ensure correct cross references. Others, however, are more substantive. Some of the more noteworthy changes include:

**Section 1101 (Short Title).** The Trust Code will be an amendment of 1998 P.A. 386, which is the act that created EPIC, and inserted as Article VII of what is now known as EPIC. This Article VII would be referred to as the Michigan Trust Code. Articles I through VI and VIII of the act will continue to be referred to as EPIC. The Michigan Trust Code will rely on portions of EPIC just like Article VII of EPIC now relies on the rest of EPIC. This includes definitions.

**Section 1209 and Section 1403.** These provisions contain representation provisions that apply to court proceedings involving wills and trusts. These provisions would be conformed to match the representation provisions found in Article 3 of the Michigan Trust Code.

**Sections 1214, 3713 and 5421 (Self dealing).** These provisions will be modified for internal consistency and to follow Section 7802 of the Michigan Trust Code.

**Section 2501 (Who may make a Will).** Currently Michigan law only requires that a person be 18 and of “sound mind”. As part of the MTC the standard will be further defined. The new standard draws upon the Michigan Civil Jury Instructions and requires that the testator understands he is providing for the disposition of his property, has the ability to know the nature and extent of his property, and knows the natural objects of his bounty. In addition, a requirement will be added that the individual has the ability to understand in a reasonable manner the general nature and effect of his act in signing the will. This will make the standard of capacity to make a Will (and a revocable trust) consistent with the standard of capacity required to execute Durable Powers of Attorney and beneficiary designations.

**Section 2722 (Honorary Trusts; Trusts for Pets).** This provision was modified to incorporate some elements of the UTC that were not part of Section 2722 already.

**Section 3915 (Distribution to Trustee).** This section currently allows a personal representative to seek a bond from a trustee prior to making a distribution. The Michigan Trust Code would

excuse regulated financial institutions from posting bonds and EPIC section 3915 would be modified similarly.

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